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August 15, 2018

**CERTIFIED MAIL  
RETURN RECEIPT REQUESTED**

(Public Commenters)

RE: RESPONSE TO COMMENTS ON PROPOSED ADMINISTRATIVE ORDERS

**Alabama Power Company (APC)**

James M. Barry Electric Generating Plant, James H. Miller, Jr. Electric Generating Plant, E.C. Gaston Electric Generating Plant, Greene County Electric Generating Plant, and William C. Gorgas Electric Generating Plant

**PowerSouth Energy Cooperative (PSEC)**

Charles R. Lowman Power Plant

Dear Sir or Madam:

The Alabama Department of Environmental Management (ADEM) has made a final determination to issue the Administrative Orders to Alabama Power Company (APC) and PowerSouth Energy Cooperative (PSEC).

On March 2, 2018, a public comment period was announced by ADEM for APC (James M. Barry Electric Generating Plant, James H. Miller, Jr. Electric Generating Plant, E.C. Gaston Electric Generating Plant, Greene County Electric Generating Plant, and William C. Gorgas Electric Generating Plant) and PSEC (Charles R. Lowman Power Plant). The public comment period for the E.C. Gaston Electric Generating Plant and the Greene County Electric Generating Plant were also announced on March 7, 2018. The comment periods ended on April 1, 2018 and April 6, 2018.

All submitted comments were carefully considered and appropriate responses have been prepared. Enclosed is a summary of the comments received and the Department's response to those comments. Please call Eric Sanderson in Montgomery at (334) 271-7755 if you have any questions regarding this matter.

Sincerely,

Stephen A. Cobb, Chief  
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## **RESPONSE TO COMMENTS ON PROPOSED ADMINISTRATIVE ORDERS AUGUST 2018**

### **Alabama Power Company (APC)**

James M. Barry Electric Generating Plant, James H. Miller, Jr. Electric Generating Plant, E.C. Gaston Electric Generating Plant, Greene County Electric Generating Plant, and William C. Gorgas Electric Generating Plant

### **PowerSouth Energy Cooperative (PSEC)**

Charles R. Lowman Power Plant

The proposed Administrative Orders for the Alabama Power Company (James M. Barry Electric Generating Plant, James H. Miller, Jr. Electric Generating Plant, E.C. Gaston Electric Generating Plant, Greene County Electric Generating Plant, and William C. Gorgas Electric Generating Plant) and PowerSouth Energy Cooperative (Charles R. Lowman Power Plant) were placed on public notice on March 2, 2018. The proposed Administrative Orders for the E.C. Gaston Electric Generating Plant and the Greene County Electric Generating Plant were also noticed on March 7, 2018. Each of the proposed Administrative Orders addresses violations of the Alabama Water Pollution Control Act (AWPCA) and the ADEM Administrative Code.

Written comments were received during the public comment period. The Department reviewed all comments received during the comment period. A summary of the comments and the Department's response to those comments are set forth below. The comments in their entirety may be viewed in the official public record, which is located at ADEM, 1400 Coliseum Boulevard, Montgomery, Alabama 36110. The comments are also available through the Department's electronic filing system (e-File) which is accessible via the Department's website at <http://www.adem.alabama.gov/eFile/>.

### **ADEQUACY OF THE ADMINISTRATIVE ORDERS**

**The Department received comments on the use of administrative orders to address the noted violations. Specifically, commenters stated that the proposed Administrative Orders do not constitute diligent prosecution of the violations, and that administrative orders are intended for minor violations, not the serious violations noted.**

The Department is taking these actions pursuant to § 22-22A-5(18)a. of the Code of Alabama, which authorizes ADEM to “[i]ssue an order assessing a civil penalty to any person who violates any provision of law identified in subdivision (1) of this section, any rule, regulation, or standard promulgated by the Department....” (Emphasis added.) This statutory provision includes no condition on the nature of the violation;<sup>1</sup> rather, it plainly states that ADEM may lawfully enforce “any” violation through an administrative order.<sup>2</sup> In addition, Ala. Code § 22-22A-5(18)c. obligates the Department to consider the “seriousness of the violation” in determining the penalty amount assessed, which contemplates that violations may range in severity.

Further, as the public enforcer, ADEM's prosecutorial strategy need not coincide with that of the commenters for it to be diligent.<sup>3</sup> The proposed Administrative Orders are diligent prosecutions of the violations in that they are “capable of requiring compliance” and are “in good faith calculated

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<sup>1</sup> Likewise, the statutory provision regarding ADEM's authority to commence a civil action includes no requirement that the subject violation be “serious.” See Ala. Code § 22-22A-5(18)b.

<sup>2</sup> Ala. Code § 22-22-5(18)a. contains a list of excluded scenarios, but none are applicable here.

<sup>3</sup> See *Karr v. Hefner*, 475 F.3d 1192, 1197 (10th Cir. 2007) and *Supporters to Oppose Pollution, Inc. v. Heritage Group*, 973 F.2d 1320, 1324 (7th Cir. 1992).

to do so.”<sup>4</sup> In light of the comments received, the Department has reviewed the proposed Administrative Orders and finds that the proposed actions are the appropriate means for ADEM to exercise its enforcement responsibility with regard to these violations.

**Several commenters stated that the proposed Administrative Orders failed to substantively address and apply the penalty factors mandated by law noting that the penalties are inadequate based on available information. Another comment suggested that the Department issue additional Administrative Orders, thereby allowing the Department to surpass the statutory ceiling of \$250,000. Other comments indicate the penalty amount was not warranted. Commenters also stated that the Department did not provide enough information to evaluate how the statutory penalty criteria were applied.**

ADEM’s penalty assessment regime is comparable to EPA’s. Both “give their respective enforcement agencies discretion to assess administrative penalties within a comparable range and to use similar criteria when calculating penalties.”<sup>5</sup> In determining the penalty amounts for the proposed Administrative Orders, the Department properly considered the factors enumerated in Ala. Code § 22-22A-5(18)c. in relation to the facts specified in the proposed Administrative Orders. These considerations are explained in the proposed Administrative Orders. In light of the comments received, the Department has reviewed the proposed Administrative Orders with the associated civil penalties, and finds that the proposed penalty amounts are appropriate.

**Several commenters requested a public hearing on the proposed Administrative Orders.**

Section 22-22A-5(18)a.4. of the Code of Alabama states that the Department “may hold a hearing if the information submitted in support of the request for a hearing is material and if a hearing may clarify one or more issues raised in the written comments.” The Department has considered the requests for hearing and determined that none of the issues raised in the written comments need additional clarification. As such, the Department has determined that a public hearing is not warranted.

**Several commenters expressed concern that the proposed Administrative Orders serve as an attempt to preclude meaningful public participation.**

As stated above, the Department has statutory authority to issue an administrative order for any violation, but it must follow certain procedural requirements in doing so. Such requirements include commencing the enforcement action “by notifying the person subject thereto in writing of the alleged violation” and affording them an opportunity to meet with the Department, as well as providing for public participation in the enforcement process.<sup>6</sup> The Department followed all applicable procedural requirements in issuing these Administrative Orders, and determined that compliance with such requirements allowed for meaningful public participation.

In addition, public documents related to these actions, including the 2017 Annual Groundwater Monitoring and Corrective Action Reports noted in the proposed Administrative Orders as well as documents submitted pursuant to the requirements of the Orders, will be available for public review via the Department’s e-File system, providing continuing transparency. The Department also

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<sup>4</sup> *The Piney Run Preservation Ass’n v. The County Com’rs of Carroll County, MD*, 523 F.3d 453, 459 (4th Cir. 2008) citing *Friends of Milwaukee’s Rivers v. Milwaukee Metropolitan Sewerage Dist.*, 382 F.3d 743, 760 (7th Cir. 2004).

<sup>5</sup> *McAbee v. City of Fort Payne*, 318 F.3d 1248, 1256 (11th Cir. 2003).

<sup>6</sup> See Ala. Code § 22-22A-5(18)a.

remains mindful of the public participation aspects of the ongoing Federal and State CCR Rule processes, including the requirements that the owner hold a public meeting to discuss the remedies under consideration prior to selecting a final remedy, and that it maintain a publicly accessible CCR website.

### **CORRECTIVE MEASURES**

**Several commenters expressed concern that the proposed Administrative Orders do not contain substantive remedial measures. Specifically, commenters felt the proposed Administrative Orders give APC and PSEC too much autonomy and discretion when it comes to remedy selection.**

The Department carefully assessed the remedial measures contained in the proposed Administrative Orders and determined that the required actions will effectively protect human health and the environment. The requirements were designed to mirror those in the 2015 Federal Coal Combustion Residual (CCR) regulations (“the Federal CCR Rule”) (as well as the State CCR rules), which provide for full assessment of the contamination and potential corrective measures prior to selection of a remedy. Given the limited scope of information available at this time, it is necessary that a comprehensive groundwater investigation be conducted to determine the nature and extent of the contamination and identify any relevant site conditions that may affect the remedy selected at each of the facilities. Once such information is gathered and assessed, an appropriate remedy can be developed and proposed for approval by the Department. The Department expects that the appropriate remedy for each facility will vary, just as circumstances vary from facility to facility. However, in all cases, the selected remedy for each facility must attain the groundwater protection standards and attain source control objectives. The proposed Administrative Orders include Departmental oversight components to ensure that the investigative phase of the work is completed in a thorough and efficient manner, and that the proposed remedy is appropriate for each site and is sufficient to accomplish compliance. The Department will ensure that the selected remedy complies with and is implemented in accordance with Federal and State CCR rules.

**Commenters expressed concern that the proposed Administrative Orders did not mandate full removal of the coal combustion residuals, stating that the only real solution is to require total excavation of the pond. Another commenter stated that they would support the proposed Administrative Orders only if remediation includes full removal of contamination, and proper excavation of waste. In addition, the Department received comments stating that closure in place should not be allowed for ponds located in or adjacent to waterbodies.**

As mentioned above, the full nature and extent of the contamination at each facility is not yet fully known, and “[a]dequate characterization of the release is critical in designing and effectively implementing a protective corrective action program....”<sup>7</sup> Therefore, at this time, there is not enough information available to warrant requiring total removal of the CCR material, otherwise known as clean closure, at any particular facility. After complete investigation and characterization of site conditions, APC and PSEC must develop a corrective measures assessment. Following that, the appropriate remedy for each facility will be selected (subject to ADEM approval) based on those site specific considerations. Thus, it remains to be seen whether clean closure is the most appropriate remedy at one or more of the facilities.

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<sup>7</sup> Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities, 80 Fed. Reg. 21302-01 at \*21405 (April 17, 2015).

The Federal CCR Rule and the State CCR rules, on which the corrective measure portions of the proposed Administrative Orders were based, allow for closure of a CCR unit either by leaving the CCR in place and installing a final cover system or through the removal of the CCR and decontamination of the CCR unit. Neither the Federal nor the State CCR rules specify the selection of one method or another. In fact, “both methods of closure...can be equally protective, provided they are conducted properly.”<sup>8</sup> As provided in the proposed Administrative Orders, the Department will maintain active oversight of all required remedial actions.

As discussed previously, proposed remedies will be evaluated based on their effectiveness and protectiveness, the degree of certainty that the remedy will prove successful, and on other site specific characteristics. The Department expects that full implementation of the requirements of the proposed Administrative Orders will lead to APC’s and PSEC’s compliance at each of the facilities, and the Department will maintain active oversight to ensure that compliance is ultimately achieved.

**Several commenters suggested that the Department should shorten deadlines in the proposed Administrative Orders.**

As noted above, current information does not provide a clear picture of the full nature and extent of contamination at each facility. Therefore, an investigative phase is required to gather and assess such information. Only then can an appropriate remedy be developed, proposed, evaluated, and selected. The Department must also have sufficient time to thoroughly review all information as it becomes available. “This phased approach...provides for a graduated response over time to the problem of groundwater contamination as the evidence of such contamination increases. This allows for proper consideration of the transport characteristics of CCR constituents in groundwater, while protecting human health and the environment.”<sup>9</sup> The Department has determined that the deadlines as proposed in the Administrative Orders are appropriate to allow for such necessary investigation as expeditiously as is feasible, but also require prompt action to address identified issues.

**NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) REQUIREMENTS**

**Several commenters stated that the NPDES permits issued to APC and PSEC are outdated and should be revised before allowing dewatering activities. The Department also received comments stating that the evidence of groundwater contamination confirms violations of APC’s and PSEC’s NPDES permits.**

The Department recognizes that dewatering of the CCR surface impoundments is an early necessary step in the closure process. Thus, the Land Division of ADEM will continue to work closely with the ADEM Water Division to ensure the proper considerations are being made as the requirements of the proposed Administrative Orders are carried out. The comments received regarding the regulatory oversight of the National Pollutant Discharge Elimination System (NPDES) program have been forwarded to the Water Division for review and consideration. The Water Division continues to review data and other information related to each of these facilities and will propose NPDES permitting and/or enforcement action as necessary to ensure compliance with NPDES program requirements.

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<sup>8</sup> 80 Fed. Reg. 21302-01 at \*21412.

<sup>9</sup> Id. at \*21396.

**A comment was received requesting clarification on whether the proposed Administrative Orders were intended to address potentially applicable provisions<sup>10</sup> of APC's and PSEC's NPDES permits.**

The proposed Administrative Orders enforce the AWPCA, but not as it pertains to the NPDES permitting program, which is administered by the Water Division of ADEM. The Department exercises its power to protect groundwater resources in Alabama independent of the NPDES permitting program.<sup>11</sup> In fact, Part III. G. of the NPDES Permits was intended to specify that discharges to groundwater are not authorized under the NPDES program but are managed under other State program authority. Thus, discharges to groundwater by APC or PSEC are not subject to NPDES permit requirements but may be addressed through other means, as exemplified by the proposed Administrative Orders.

Ensuring the protection of waters of the State is a primary objective of the proposed Administrative Orders. In taking these enforcement actions, the Department is imposing stringent monitoring, remedial, and reporting requirements it has concluded will appropriately and effectively address groundwater contamination at the facilities. The Department expects that the requirements will also address any subsequent migration of pollutants, including to surface waters. As previously stated, the Land Division of ADEM will continue to work closely with the Water Division to ensure the proper considerations are being made as the requirements of the proposed Administrative Orders are carried out.

### **INEFFECTIVENESS OF ORDERS**

**Several commenters expressed concern that the proposed Administrative Orders would not address all unpermitted discharges but only maximum contaminant level (MCL) violations.**

Although the proposed Administrative Orders specifically note primary MCL exceedances at the facilities, the Orders encompass all unpermitted discharges to groundwater by APC and PSEC. The Orders refer to the 2017 Annual Groundwater Monitoring and Corrective Action Reports submitted by APC and PSEC, and state that such Reports indicate that APC and PSEC have "caused or allowed the unpermitted discharge of pollutants associated with ash pond wastewater...from [the facilities] to waters of the State."<sup>12</sup> That statement is a comprehensive acknowledgement of all unpermitted discharges to groundwater as identified by the data provided in the Reports. Moreover, the Department has concluded that the remedial action required by the proposed Administrative Orders is the most appropriate response to the data provided and anticipates that these enforcement actions will effectuate compliance.

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<sup>10</sup> APC's and PSEC's NPDES Permits authorize specific, limited and/or monitored discharges from identified point sources to identified receiving waters – all of which are surface waters of the State. Most of the NPDES permit provisions identified by the commenters are standard permit conditions included in all NPDES permits. The boilerplate conditions are found in ADEM's NPDES regulations and are grounded in the U.S. EPA's NPDES requirements at 40 C.F.R. Part 122, Subpart C.

<sup>11</sup> See ADEM Admin. Code r. 335-6-6-.01 (referencing Section 402(b) of Clean Water Act, "a state may administer a permit program for discharges into navigable waters within its jurisdiction"). EPA has not objected to this approach via its oversight authority of Alabama's NPDES program. EPA likewise does not regulate groundwater quality through NPDES Permits. *September 2010 U.S. Environmental Protection Agency NPDES Permit Writers' Manual*, p. 1-7.

<sup>12</sup> Paragraph 6., p. 2 of the proposed Administrative Orders for APC. Paragraph 6., p. 2 of the proposed Administrative Order for PSEC is worded slightly differently.

**Comments were also received which stated that the proposed Administrative Orders do not go far enough to mitigate issues at the facilities.**

As the environmental regulatory agency for the State of Alabama, the Department is exercising its statutory authority to enforce the AWPCA in an effective manner. The underlying purpose of the proposed Administrative Orders is to comprehensively resolve APC's and PSEC's unauthorized discharges into waters of the State and to bring about compliance. The proposed Administrative Orders are structured to address both existing and future risks of discharges by requiring actions to control the source of the contamination. The proposed Administrative Orders are prospective in nature and require APC and PSEC to allocate extensive resources into the investigation of the full nature and extent of the contamination, to thoroughly assess corrective measures, to propose and implement the selected remedy, to continue groundwater monitoring to demonstrate the effectiveness of the remedy, and to regularly report to the Department on progress – all with consistent Departmental oversight. Given these factors and in light of the comments received, the Department finds that the proposed administrative actions are appropriate.

#### **POINTS TO CLARIFY IN PROPOSED ORDERS**

**A comment was received requesting that the Department clarify the goal of corrective measures required by the proposed Administrative Orders. Specifically, Paragraph C states the remedy should attain the groundwater protection standard (GWPS) but also states the remedy should continue until the constituent level has returned to background levels.**

Paragraph C under the "ORDER" section of the proposed Administrative Orders states that the remedy must attain the established GWPS. It also states that the owner must continue the *assessment groundwater monitoring program* (not remediation) until the concentration of each constituent detected in exceedance of a MCL or the established GWPS has returned to a level at or below background levels. This mirrors the requirements in the Federal CCR Rule (as well as the State CCR rules).

**A comment requested clarification on whether documents used for compliance with the Federal CCR Rule could be used to comply with the requirements of the proposed Administrative Orders, if appropriate.**

Much of the language included in the investigative and corrective measures portions of the proposed Administrative Orders was mirrored off the Federal CCR Rule and the State CCR rules. As such, the Department recognizes that APC and PSEC may rely on certain documents, plans and/or reports that satisfy the requirements of both the regulations (Federal or State) and the proposed Administrative Orders. Where additional information is required as a part of the proposed Administrative Orders, however, APC and PSEC must provide that information in order to comply with the Orders.

**A comment requested the Department clarify Paragraph F.**

No part of the proposed Administrative Orders, including Paragraph F of the “ORDER” section, should be interpreted as providing the Department any additional authority beyond that previously granted to it.

**A comment was received which identified two timelines in the proposed Administrative Order for the James M. Barry Electric Generating Plant which are different from those in the other proposed Administrative Orders and recommended revisions.**

The Department will correct the identified administrative errors.



8-16-18

*Mailed Response to Commenter on proposed orders*

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